LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAR 28 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 890

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—v.—

TOM C. CLARK, Attorney General as successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

A. WALTER SOCOLOW,
Counsel for Petitioner.

JOSEPH M. COHEN,
On the brief.

TABLE OF CONTENTS

PAGE

I. Petitioner, as Temporary Receiver, took title to the ASCAP debt on the date of his appointment 1

II. The freezing controls did not preclude the State of New York from vesting the ASCAP debt in its receiver 15

Conclusion 34

CITATIONS

Cases

Addy v. U. S., 264 U. S. 239, 244, 245 25

Becker Steel Co. v. Cummings, 296 U. S. 74, 79 16

Bernstein v. N.V. Nederlandsche-Amerikaansche etc., C. A. 2, Feb. 21, 1949 ..... 23, 32

Bollack v. Societe Generale etc. (1st Dept. 1942) 263 App. Div. 601 ..... 23, 25

Brewster v. Gage, 280 U. S. 327, 337 23

Burnet v. Chicago Portrait Co., 285 U. S. 1, 16 28

Chew Heong v. U. S., 112 U. S. 536 ..... 23, 25

Chillicothe Furniture Co. v. Revelle, C. C. A. 8th, 14 F. 2nd 501, 504 18

Church of the Holy Trinity v. U. S., 113 U. S. 457, 463 17

City of Chicago v. Fielderest Dairies, Inc., 316 U. S. 168, 171 2

Clark v. Chase Nat'l Bank, et al., Civ. No. 44-617 and 44-618, S. D. N. Y. 23, 26, 33

PAGE

Crawford v. Burke, 195 U. S. 176, 189 ..... 22, 23

Ex Parte Baldwin, 291 U. S. 610, 615 14
Ex Parte Tyler, 149 U. S. 164, 181 13
Farmers Loan and Trust Co. v. Lake Street Elevated Co., 177 U. S. 51, 61 13

Ginsberg and Sons v. Popkin, 285 U. S. 204, 208 ..... 22, 23
Great Northern Ry. Co. v. Sutherland, 273 U. S. 182, 191 13

Harken v. Brundage, 276 U. S. 36 14

In re Lenox Corp., 57 App. Div. 515, aff'd 167 N. Y. 623 4
International Shoe Co. v. Washington, 326 U. S. 310, 316 12

Kline v. Burke Construction Co., 260 U. S. 226, 229, 231 14

Leeds v. Guaranty Trust Co., 277 App. Div. 909, aff'd 297 N. Y. 1019 ..... 25, 33
Lion Bonding and S. Co. v. Karatz, 262 U. S. 77, 78 14

Markham v. Allen, 326 U. S. 490 ..... 13, 14
Matter of Christian Jensen Co., 128 N. Y. 550, 553 4
McKinney v. Landon, 209 F. 300, 306 13
Miller v. U. S., 294 U. S. 435, 439 25
Murphy v. John Hoffman Co., 211 U. S. 562, 569 14
Musser v. Utah, 333 U. S. 95 2

PAGE

Nealis v. American Tube and Iron Co., 150 N. Y. 42 10-12, 15

Palmer v. Texas, 212 U. S. 118, 129 13
Pampagna Sugar Mills v. Trinidad, 279 U. S. 211, 218 8
Pennoyer v. Neff, 95 U. S. 715, 727 2, 6, 9
Penn. Mutual Life Ins. Co. v. Lederer, 252 U. S. 523, 528 17
Peo. v. Community Live Poultry Corp., 127 Misc. 396 9
Polish Relief v. Banca Nationala a Rumaniei, 288 N. Y. 332 23
Princess Lida v. Thompson, 305 U. S. 456, 466 14

Railroad Com. of Texas v. Pullman Co., 312 U. S. 496, 500 2

Schechter v. U. S., 295 U. S. 495 17
Singer v. Yokohama Specie Bank, 293 N. Y. 542 23
Spector Motor Service, Inc. v. McLaughlin, 323 U. S. 101 2
Stoehr v. Wallace, 255 U. S. 239, 245 16

Texas and P. R. Co. v. U. S., 289 U. S. 627, 640 28

U. S. v. Bank of New York & Trust Co., 296 U. S. 463, 477, 478 14
U. S. v. Birdsall, 233 U. S. 223 28
U. S. v. Butler, 297 U. S. 1 17
U. S. v. Chemical Foundation, 272 U. S. 13 28
U. S. v. Cohen Grocery Co., 255 U. S. 81, 88 16
U. S. v. Klein, 303 U. S. 276, 282 14
U. S. v. Leiner, 143 F. 2nd 298 30

PAGE

U. S. v. MacDaniel, 7 Peters 1 21

Wilcox v. Natl. Shoe & Leather Bank, 67 App. Div. 466, 479 4

Constitution and Statutes

U. S. Constitution

10th Amendment 3

N. Y. Civil Practice Act

Secs. 814, 815, 824 6

Sec. 825 ..... 4, 6, 7

Secs. 916 (d), 917 (2) 13, 18

Sec. 977-b 18, 29

Subd. 4 ..... 4, 8

5 ..... 5, 6, 8

10 ..... 7, 8, 9

12 10

14 7

18 7

19 ..... 4, 5, 7, 8, 11

20 7

21 7

22 7

PAGE

Miscellaneous

General Ruling #3 (5 F. R. 2133) 5
Gilbert-Bliss, Civil Practice Act of N. Y. note to Sec. 977-b 8

U. S. Treasury, Administration of the Wartime Financial and Property Controls of the United States Government, P. 3; PP. 5-6; PP. 20-1; P. 40 ..... 3, 18, 19, 24, 31

Exec. Order 8389 20
Exec. Order 9193 (Amending Exec. Order 9095) (7 F. R. 1971; 7 F. R. 5205; 10 F. R. 6917) 8

First War Powers Act by Sec. 5(b)(1)(A) 10, 23

General Ruling No. 2; 5 F. R. 1474 30
General Ruling No. 12, issued April 21, 1942 (7 F. R. 2991) 22, 25
General Ruling No. 12, subd. 4 ..... 26, 31
5(b) 22

Trading With the Enemy Act, Sec. 5(b) 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—v.—

TOM C. CLARK, Attorney General as successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

I

Petitioner, as Temporary Receiver, took title to the ASCAP debt on the date of his appointment.

1. It is conceded that if Petitioner took title to the ASCAP debt upon his appointment as temporary receiver the judgments below must be reversed.

Respondent says the question of the temporary receiver's title is novel; that it has been decided below by "judges of

long experience"; and that, therefore, perfunctory approval should be given to the holdings below (Resp. brief, pp. 41-42). The case does not admit of routine review.

In construing §977-b, the judges below overlooked the fundamental guide-post in the case. They overlooked the fact—now all but admitted by respondent—that the temporary §977-b receiver is the device through whom the statute achieves *in rem* jurisdiction. They denied his title because they mistakenly likened him to the temporary equity receiver who acts as a mere custodian.

When the judges below have so utterly mistaken the purpose of the statute—despite its plain language and the Constitutional implications of their holdings—it is hardly appropriate to ask that their judgments be perfunctorily approved.

We are dealing here with one aspect of an important state statute frequently resorted to. Respondent says the question is "novel". If he means that no state case has raised or answered the question, we agree. We do not agree that the courts below should have undertaken the answer. By their answer they have excised the seizure device specified by the statute. The statute, as it emerges from their construction, authorizes an *in rem* judgment without prior seizure of the *res*—a result which has been unconstitutional since *Pennoyer* v. *Neff*, 95 U. S. 715.

This Court has repeatedly expressed its reluctance and, indeed, has declined to construe state statutes in cases such as this. *Mussser* v. *Utah*, 333 U. S. 95; *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, 171; *Railroad Com. of Texas* v. *Pullman Co.*, 312 U. S. 496, 500; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101. We urged below—and reiterate here—that the important question of state law here involved be referred to the state court in line with the policy espoused by these cases.

Respondent says that the federal courts should put aside their reluctance here because "unusually important federal rights"[1] are involved. Referral to the State Court cannot be decided by balancing the importance of the opposing rights asserted. In enacting §977-b, the State of New York exercised the exclusive power, reserved to it by the Federal Constitution (10th Amend.), to deal with property within its borders. This power is, at least, of equal dignity with the Congressional authority which respondent seeks to implement in this case.

* * * * *

Respondent repeats his arguments which led the courts below to conclude that the temporary §977-b receiver does not take title. These arguments rest on (a) his construction of the statute and (b) his analogy of the temporary §977-b receiver with the temporary equity receiver. We believe that his argument is fallacious in both aspects.

2. We agree with respondent that §977-b must be read as a whole to ascertain its true meaning. Neither respondent nor the courts below have done this. Otherwise, they would have construed the statute in the light of the scheme—obvious from its terms—to achieve, through the temporary receiver, *in rem* jurisdiction adequate to deal with *all* the assets of the foreign corporation.

Respondent does not deny that the statute embraces a plan for *in rem* jurisdiction over *all* the local assets of the defunct foreign corporation. He does not dispute the need for a seizure device to effect the *in rem* jurisdiction con-

---

1 The issue here is whether under New York law AKM continued to have any interest in the ASCAP debt after the appointment of the temporary §977-b receiver. If it did have such an interest, concededly, the Custodian is entitled to it. Respondent, a federal officer, is merely asserting AKM's rights, if any, under State law. *Ergo*, there is no "important federal right" or, indeed, *any* federal right involved here.

templated. Nor does he deny that the temporary receiver is this device. He argues only that the seizure is completed —not when the temporary receiver is appointed, but—when notice of the appointment is given to someone holding *some* property of the corporation. The argument misconceives the nature of *in rem* proceedings.

Seizure for jurisdictional purposes is a provisional remedy. The jurisdiction of the Court attaches when the provisional remedy is granted.[2] But continued jurisdiction may be conditioned upon some act to be done thereafter. *N. Y. Civil Practice Act*, §825.

Here the provisional remedy was granted when petitioner was appointed temporary receiver and simultaneously vested with title[3] (§977-b, subd. 4, 19). Jurisdiction then attached. It was an *in rem* jurisdiction over *all* the assets

---

2 Respondent (Brief, p. 49, n. 36) says that the §977-b action is commenced upon issuance of the summons which occurs after the temporary receiver has served the copy of the order of his appointment. The statement is erroneous. *First*, under subd. 4, the summons must issue before or concurrently with the application for the appointment of the temporary receiver. *Second*, since the provisional remedy of seizure is involved here, jurisdiction attaches and the action is commenced upon the grant of the provisional remedy i.e. the appointment of the temporary receiver. *N. Y. Civil Practice Act*, §825. Respondent has confused commencement of the action with service of the summons by publication.

3 Respondent argues (Brief, p. 44, n. 34) that the record does not show that the temporary receiver qualified by filing his bond before June 14, 1941. (The burden was on respondent, as plaintiff, to develop the facts necessary to his case.) He cited cases to show that under New York Law other receivers acquire no rights until they have so qualified. The argument is inapt. §977-b, subd. 19, vests title in the temporary receiver on the *making* of the order appointing him—not upon his compliance with the direction to furnish security. Moreover, the New York cases are clear that, when the receiver qualifies, his rights relate back to the date of the order appointing him. *Matter of Lenox Corp.*, 57 App. Div. 515, *affd.* 167 N. Y. 623; *Matter of Christian Jensen Co.*, 128 N. Y. 550, 553; *Peo. v. Community Live Poultry Corp.*, 127 Misc. 396; *Wilcox v. Natl Shoe & Leather Bank*, 67 App. Div. 446, 479.

of the Corporation provisionally seized by the appointment of the temporary receiver. However, continued jurisdiction was conditioned upon the giving of constructive notice of the seizure specified by subd. 5. It is not denied that such notice was given here. Therefore, the title taken by respondent upon his temporary appointment continued through to his appointment in his permanent capacity.

Respondent argues otherwise. He says, in effect, that subd. 5 prescribes the manner in which the *in rem* seizure must be made. He argues that, since, under subd. 5, service of the order appointing the temporary receiver upon a debtor of the corporation must be shown to support an order for constructive service by publication, it is this act—not the appointment of the temporary receiver—which effects the *in rem* seizure.[4] The argument is misconceived.

Subd. 5 does not specify when or how the seizure of *all* the assets occurs. It does not purport to deal with the seizure in any respect. It relates solely to the constructive notice of the action commenced by the seizure theretofore made. Subd. 19, alone, specifies when and how *all* the assets are seized for the purposes of the action. It is there clearly provided that *all* the assets are taken by the temporary

---

4. So construed, the seizure would fail to achieve the purpose of the statute. The statute aims at *in rem* jurisdiction of *all* the local assets of the foreign corporation (subd. 4, 11). The service of the order and demand specified in subd. 5 is not co-extensive with this purpose. It requires merely that service be made on "*a* person * * * holding property * * * or against whom *a* claim * * * exists." Subd. 5 would be satisfied by service upon one of many local AKM debtors. But *in rem* jurisdiction of *all* the assets would require action against all of AKM's local debtors. This action is taken under subd. 19 which vests in the temporary receiver title to all of AKM's assets. Subd. 5 merely achieves constructive notice, by service of the order on *one* AKM debtor, of the seizure, made under subd. 19, of the claims owed to AKM by *all* of its debtors.

receiver "upon the making of the order" of his appointment. It is the *making* of this order—not subsequent service of the order or publication of the summons—which constitutes the seizure.

The reference in subd. 5 to service of the order appointing the temporary receiver is wholly appropriate to its theme. This subdivision deals with the constructive notice to be given of the commencement of the action. Such notice follows from publication of the summons. It follows, too, from service upon a debtor of the corporation of the order appointing the temporary receiver. Notice of the seizure thus given to its debtor is calculated to achieve notice to the corporation itself. "The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation * * *". *Pennoyer* v. *Neff*, 95 U. S. 715, 727.

Respondent confuses the seizure (by entry of the order) with notice of the seizure (by service of the order). The

---

5 Respondent argues that it is unlikely that the appointment of the temporary receiver was intended to vest him with title to all of the foreign corporation's local assets because his appointment is made "without notice to the corporation, and with no room for the exercise of the Court's discretion" (Brief, p. 46). These circumstances merely confirm the fact that the appointment of the temporary receiver effects a seizure for purposes of *in rem* jurisdiction. Seizure without notice is usual where the object of the seizure is the acquisition of *in rem* jurisdiction. *N. Y. Civil Practice Act* §§814, 815, 824. Since the Court's jurisdiction rests upon such seizure, there is no reason for the Court to exercise its discretion before it has acquired jurisdiction. The right to seize rests upon a *prima facie* showing of the facts upon which the statute conditions the seizure. Given these facts, the Court must take jurisdiction. *In personam* jurisdiction by personal service of summons does not rest on the Court's discretion. There is no reason why *in rem* jurisdiction should be so conditioned.

seizure of title through appointment of the temporary receiver—not the notice of the seizure through publication or service of the order—perfects the *in rem* jurisdiction. *N. Y. Civil Practice Act*, §825.

The most that can be said for respondent's argument is that service of the demand and order perfected the seizure as to ASCAP, the seizure as to AKM having been perfected by subd. 19.

3. Respondent's construction of §977-b—adopted below—rests upon a fallacious premise. He assumes, as the lower courts found, that the statute intends two receivers—one temporary, the other permanent. Relying on this premise, he scrutinizes the statute to ascertain which of its provisions can be said to apply to the temporary and which to the permanent receiver. In line with this approach he asserts that the "plan of the statute is chronological". Therefore, he says, the statute should be read as if divided into two "chapters". The first, he says, comprises subds. 1-9 and relates to the temporary receiver and other matters preliminary to judgment. The second, he alleges, comprises subd. 10 ff. and relates to the permanent receiver" (Resp.

---

6 Respondent's assumption that Subds. 10ff of §977-b deal only with the permanent receiver, is belied by numerous instances to the contrary. For example, Subd. 14(c) obviously deals with the temporary receiver in fixing the date of his appointment as a factor in deciding the rank of claimants. Subd. 18 deals with the temporary receiver in fixing the time prior to his appointment plus three years as time which shall not be computed for the purpose of applying the statute of limitations. Subd. 19 deals with actions brought by and against the receiver and his substitution, and intervention, in, and revival of, pending actions. This subdivision obviously deals with the rights of the temporary, as well as the permanent, receiver. Subd. 20 deals with the manner in which "Any receiver" may take possession of the Corporation's assets. Respondent's argument that the temporary receiver takes only possession would make Subd. 20 peculiarly applicable to the temporary receiver. Subd. 21 and 22 are obviously applicable to the temporary, as well as the permanent, receiver.

brief, pp. 45-46). Therefore, he concludes, the title vesting clause of subd. 19 must be regarded as referring only to the permanent receiver.[7]

This analysis is unsound. The statute contemplates but one receiver. Prior to the amendment of subd. 10 in 1938, the statute contained no reference whatsoever to a "permanent receiver." The words "permanent receiver" were introduced only in subd. 10 by the 1938 amendment and do not appear in any other subdivision of the statute.

The pre-1938 version of subd. 10, provided that, if the allegations of the complaint were established, "the Court must thereupon direct judgment making permanent the appointment of the temporary receiver appointed pursuant to subdivision four hereof and directing the receiver to liquidate the assets * * * in the manner herein provided."[8]

Thus, it is seen that, initially, the statute contemplated only one receiver. Before judgment, his status was temporary. After judgment, it was permanent. The point of demarcation is not between temporary and permanent receiver. It is between the *duties* of "the receiver" before, and those after, the judgment. This explains why the subsequent sections of the statute merely refer to "the receiver".

Under the pre-1938 version of the statute, it was immaterial how the receiver was designated. He was one person whose activities—begun as temporary receiver—were com-

---

7. The argument disregards the plain language of the statute. Subd. 19 vests title in the receiver who is appointed by "order". Only the temporary receiver is so appointed (Subd. 4). The permanent receiver is appointed by the judgment (Subd. 10). Throughout the statute the phrase "order appointing the receiver" is applied exclusively to the temporary receiver (Subd. 5, 8). It follows that the reference in Subd. 19 to the vesting of title in the receiver "upon the making of the order appointing him" pertains to the temporary receiver. *Pampanga Sugar Mills* v. *Trinidad*, 279 U. S. 211, 218.

8 Gilbert-Bliss, *Civil Practice Act of New York*, note to §977-b.

pleted as permanent receiver. Therefore, the references to "the receiver", following subd. 10, referred to the receiver who, first, was temporary and, later, permanent, and not, as respondent argues, to the receiver who was permanent as distinguished from the one who was temporary.

The 1938 amendment of subd. 10 did not change the plan of the statute in this regard. It merely clarified it. As originally enacted, if read literally, there could be no receiver who was not first temporary and later permanent. This is because subd. 10 permitted the appointment, permanently, of *only* that person who had served as receiver temporarily. Since a temporary receiver could be appointed only where the proceeding was *in rem* (subd. 4), the statute failed to provide for any receiver where the action proceeded *in personam*.

The amendment of 1938 remedied this defect by changing subd. 10 to permit the appointment of a receiver by the judgment without regard to whether a temporary receiver had been appointed theretofore. This amendment was not designed to, and did not, change the plan of the statute. It did not divide it into two parts, one relating to the temporary receiver, the other to the permanent receiver.

The fact is that the statute, as originally drawn, while permitting the action to proceed on personal service, had been fashioned largely upon the assumption that *in rem* jurisdiction would have to be resorted to because personal service on defunct foreign corporations could rarely be accomplished. Where the action was *in rem* the temporary receiver by his appointment was given title to, and was commanded to take, *all* the assets. When his appointment was made permanent, he was commanded to liquidate and distribute *all* the assets. Under *Pennoyer* v. *Neff*, *supra*, after judgment, the receiver, in his permanent capacity,

could liquidate and distribute *only* what he had taken in his temporary capacity, prior to the judgment. The line of demarcation in the statute is not between temporary and permanent receiver. It is between the proceedings before, and those after, the judgment. Since the latter may be constitutionally directed only to the assets taken before the judgment, it would be logical to construe the statute to grant broad powers to the receiver, while temporary, to take the assets, in order to insure that the receiver, when permanent, would in fact have assets to liquidate and distribute. Cf. *Nealis* v. *American Tube & Iron Co.*, 150 N. Y. 42.

4. Respondent argues that the temporary receiver is merely directed to "take, receive and reduce to his possession any and all assets" of the foreign corporation. This, he says, shows the limit of the temporary receiver's authority. To do this does not "make it appropriate that he take title to the corporate assets" (Resp. brief, p. 46). We believe that precisely the reverse is true.

The fault in respondent's reasoning—and this inheres in the opinions below—is that he confuses the functions of the receivers with their powers. The temporary receiver is commanded to take *all* of the assets. To this end he has all of the powers conferred upon him by subd. 12, in addition to the specific powers granted to him elsewhere in the statute. The permanent receiver is commanded to liquidate and distribute those assets. To this end, he, too, is endowed with the powers specified in subd. 12. These commands do not limit what the receivers may do—they direct what shall be done in any event. These directions to the respective receivers are definitions of function—not authority.

Where the proceeding is *in rem*, the permanent receiver may liquidate and distribute only those assets which have

been seized through the temporary receiver prior to the judgment. If the temporary receiver takes nothing the permanent receiver can distribute nothing. The statute (subd. 19) wisely vests title and broad powers in the temporary receiver, because the extent to which the temporary receiver succeeds in discharging his duty to take all the assets determines the extent to which the permanent receiver will succeed in discharging his duty to make distribution. It would be strange, indeed, if the statute gave broad powers to the permanent receiver to liquidate and distribute assets which, as temporary receiver, he had no, or only limited, power to acquire.

5. Respondent urges here—as he did with success below—that, by an analogy to the temporary equity receiver, the temporary §977-b receiver does not take title. We believe we have shown in our main brief (pp. 23-28, and N. 3) that no such analogy can be made.

Respondent is pressed to show why, if any analogy should be made, the temporary §977-b receiver should not be compared with the temporary receiver of a domestic corporation who, under *Nealis* v. *American Tube & Iron Co.*, 150 N. Y. 42, takes title. He intimates now (Resp. brf., p. 51) that, perhaps, the temporary §977-b is not to be compared with any other temporary receiver. This is precisely what we have argued. No comparison is necessary or permissible in the face of the clear direction in §977-b, subd. 19, that title vests in the temporary §977-b receiver upon his appointment. We cited the *Nealis* case only because we believed that if, an analogy were to be made, it should be an apt one.

Respondent would reject the authority of the *Nealis* case. There, he says, "The Court was loosely using the word 'title' in the sense of the receiver's statutory authority to

reduce assets to possession and to bring suits" (Resp. brf., pp. 51-52). The fact appears to be to the contrary because the court, as it explicitly states, used the term "title" in relation to "the important powers [including title] that are exercised by a permanent receiver."

The *Nealis* case—and the others which follow its authority—nullifies respondent's argument because he chose to premise his argument upon a label, "title". Syllogistically, his argument is as follows: (1) as between Petitioner (the temporary receiver) and respondent, he who has "title" must prevail; (2) a temporary receiver does not take title; (3) therefore, respondent must prevail. The *Nealis* case demonstrates that a temporary statutory receiver does take title. Therefore, it vitiates the minor premise of the syllogism and makes the conclusion false.

As we noted in our main brief, the Courts below begged the question in resting their holding on this label. Labels such as "title" do not signify why a particular holding is reached. They merely frame the result. Cf. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316.

We prefer to rest our position upon the fact that when the right to the ASCAP debt was vested, by §977-b, in Petitioner as temporary receiver, no residual interest was left in AKM upon which the Custodian's vesting order could operate. This is implicit in the fact that §977-b proposes, through the temporary receiver, to take all of the assets of the foreign corporation and to deal with them, exclusively, by the *in rem* judgment authorized by the statute. Once the assets were seized by the temporary receiver all that remained in AKM was the contingent expectancy that the assets seized would revert to it, if the action were terminated adversely to the plaintiff. Respondent, under the vesting order, could not and did not take more.

The plain purpose of the statute makes it clear that on June 12, 1941, AKM lost all right to dispose of, or deal with, its assets. That right cannot be restored to AKM—and thus to respondent—by indulging in the metaphysical exercise of determining what label shall be applied to describe the seizure legally effected under the statute.

6. Relying on *Markham* v. *Allen*, 326 U. S. 490, respondent asserts that the judgment below does not interfere with the State Court's *in rem* jurisdiction of the ASCAP debt because custody of the actual funds in suit is held neither by the State Court nor Petitioner but by ASCAP.

The argument overlooks the implications of the *in rem* seizure of a chose in action such as the ASCAP debt. In such cases, the nature of the intangible involved makes manual seizure impossible. Symbolic seizure is resorted to. In attachment cases, such seizure is effected by a declaration of seizure and an injunction against the attachment debtor. *N. Y. Civil Practice Act*, §§916(d), 917(2). Here, it follows from the vesting of title in the temporary receiver (§977-b, subd. 19) reinforced by punishment—as for a contempt—of those who interfere with his possession, *Ex parte Tyler*, 149 U. S. 164, 181. In law, such symbolic seizure—without actual seizure—vests the court with possession. *Chillicothe Furniture Co.* v. *Revelle*, C. C. A. 8th, 14 F. 2d 501, 504; *McKinney* v. *Landon*, 209 F. 360, 306; *Farmers Loan & T. Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51, 61; *Palmer* v. *Texas*, 212 U. S. 118, 129.

The Custodian's vesting order, involved here, was also an attempted symbolic seizure. *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 191.

Where, as here, two judicial seizures are attempted, concurrently, a collision of jurisdiction is inevitable.

The State Court's jurisdiction, by seizure at the commencement of the §977-b proceeding, attached first—long

before the Custodian invoked the jurisdiction of the courts below. Therefore, the State Court—to the exclusion of the lower federal courts—was, alone, empowered to hear and determine, in the first instance, the controversy now here for review. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229, 231; *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477, 478; *Ex parte Baldwin*, 291 U. S. 610, 615; *Murphy* v. *John Hoffman Co.*, 211 U. S. 562, 569; *Princess Lida* v. *Thompson*, 305 U. S. 456, 466; *Harken* v. *Brundage*, 276 U. S. 36.

The judgments below have charged the symbolic possession of the ASCAP debt from the State Court, which had it, to the respondent, who sought it. The Custodian's subsequent seizure has been made to prevail over that of the State Court. Deprived of the fruit of its seizure, the State Court's *in rem* judgment, appointing petitioner receiver, is deprived of all force and is rendered a nullity.

Respondent asserts that *Markham* v. *Allen*, *supra*, warrants the result here. There is no resemblance between the cases. In *Markham* v. *Allen*, this Court upheld the right of the federal court to declare the Custodian's rights on distribution of a decedent's estate as against the claims of the resident heirs. Only rights on distribution were involved. The Custodian did not—as he does here—challenge the right of the State Court *to hold, administer and distribute* the ASCAP debt. Here the judgment below—as distinguished from that in *Markham* v. *Allen*—is not "subordinate to every right" established by the state court decree and "effective only so far as it established rights derived" therefrom. *U. S.* v. *Klein*, 303 U. S. 276, 282. Here the judgment is in defiance of every such right and an unwarranted collateral attack on the State Court's judgment. *Lion Bonding & S. Co.* v. *Karatz*, 262 U. S. 77, 88.

If were as if the ASCAP debt was in the hands of the State Court on the day preceding the judgment below and

in the hands of the Custodian on the day of the judgment. Plenary power to hold, administer and distribute the debt existed in the State Court on the former date. Nothing was left in the State Court on the latter date—not even jurisdiction to proceed with the action. The collision here with the State Court's jurisdiction was actual and annihilating.

II

The Freezing Controls Did Not Preclude the State of New York from Vesting the ASCAP Debt in Its Receiver.

Respondent argues, in effect, that the Joint Resolution expressly voids the judicial seizure of frozen funds and that, if found not to do so expressly, it must, nevertheless, be construed as though it did in order that its objectives be achieved. These objectives, he contends, require an all-embracing, unyielding, regulatory system giving to the President—to the utter exclusion of the states—sole power to deal with frozen funds.[9] As applied here, the argument is that the freezing controls not only precluded Petitioner from taking title to the ASCAP debt upon his permanent appointment but, in fact, voided and nullified, *retroactively*, the rights vested in Petitioner by his temporary appointment made before the effective date of the freezing controls.

At the outset, this argument meets the insuperable bar of constitutional limitations. Concededly, the power of the

9. Resp. brf. pp. 20, 23. The argument on page 20 of respondent's brief that no exceptions from the "area of control" were intended ignores the fact that transactions in "chattels" and "real property", as well as many other transactions, were not subjected to the controls. This is discussed in detail *post*, page 22.

Executive to nullify and vest in time of war has constitutional sanction. This is true only because §9 of the Trading with the Enemy Act complies with the dictates of due process by affording to the person, wrongfully deprived of his property, an effective remedy for the vindication of his rights.[10] The Joint Resolution affords no remedy. Lacking due process and absent the exigency of war, the Joint Resolution and Exec. Order 8389, in their application to Petitioner's rights, would be unconstitutional if given the force here asserted.

1. *The objectives and nature of the peacetime freezing controls.* An inherent weakness in respondent's argument is that it breathes into the Joint Resolution, passed in peacetime, objectives born of the subsequent war and its aftermath.[11] The Joint Resolution was fully adequate to accomplish its peacetime purpose. It was not shaped to the exigencies of war. Faced with this fact, respondent, for his purposes, is forced,—sometimes to the point of fantasy[12]—to stretch the Joint Resolution so as to encompass wartime objectives never intended or envisioned by Congress on May 7, 1940.

A preliminary observation is apt. The Joint Resolution provides no guides—other than defining the property and

---

10 *Stirke* v. *Wallace*, 255 U. S. 239, 245; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79. It should be noted that the advent of war does not abrogate the protection afforded by the Fifth Amendment. *U. S.* v. *Colten Grocery Co.*, 255 U. S. 81, 88.

11 The objectives of freezing control, as stated by respondent at pp. 34-37 of his brief, would require the impossible assumption that, when Congress passed the Joint Resolution on May 7, 1940, it envisioned and created a regulatory plan which would dovetail neatly into all of the exigencies of the later war and its consequences.

12 For instance, his argument that the Supreme Court of the State of New York, acting through its receiver, and ASCAP, a society of composers, are "banking institutions" within the meaning of Exec. Order 8389 (Resp. brf., p. 16).

transactions covered—to the manner in which the Executive may exercise the granted powers. It furnishes no standards by which it may be determined when the Executive may, or shall, license any transaction. It affords no remedy—in court or otherwise—to any person aggrieved by any action of the Executive.

Despite the fact that the Joint Resolution is lacking in these normal essentials to valid legislation, respondent argues here that the Executive was given unlimited power—to the exclusion of the States—to proscribe and nullify any and every unlicensed transaction in frozen property. It would be singular, indeed, if Congress intended, by a statute so vague and inadequate, to grant the unlimited power, and to achieve the retrospective force for which respondent contends. Such intention, if entertained by Congress, was worthy of a far better Congressional effort than this enactment exemplifies, particularly in the face of the constitutional mandate against the delegation of legislative power to the Executive and against the enactment of vague criminal statutes. Legislation delegating powers to the President—more expertly drawn and far more explicit than that here involved—failed to meet the test of constitutionality, despite the very crucial domestic crisis of 1933 which induced the legislation.[13]

The Joint Resolution must be read only in the light of the limited purpose for which it was enacted,[14] namely, to protect the assets here of nationals of Axis-invaded coun-

---

13 *Schechter* v. *U. S.*, 295 U. S. 495 (involving the constitutionality of the National Industrial Recovery Act); *U. S.* v. *Butler*, 297 U. S. 1 (involving the constitutionality of the Agricultural Adjustment Act).

14 This purpose is to be found in the situation *then existing* "as it was pressed upon the attention" of Congress (*Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457, 463)—not in the exigencies of subsequent war-time events (*Penn. Mutual L. Ins. Co.* v. *Lederer*, 252 U. S. 523, 538).

tries consistently with the rights of American citizens against such assets." So read, the Joint Resolution establishes a regulatory scheme shaped to meet the emergency to which it was directed.

The Joint Resolution—except insofar as it extended the coverage to securities—re-enacted, almost verbatim, the 1933 version[16] of §5(b) of the Trading With the Enemy Act. The latter version, enacted to meet the banking crisis of 1933, limited the controls to transactions in money and credits. For that emergency, control of financial transactions was adequate. The Joint Resolution added the control of transactions in securities and thereby rendered the statute a means for protection—against the Axis—of all the mobile assets of the invaded countries.

These assets—credits, money and securities—were mobile assets, held, largely, by American banks. They comprised the bulk of the foreign assets involved.[17] Because of the facility with which these assets could be manipulated abroad, these alone, necessitated, and were subjected to, the controls. It was impossible, of course, to supervise or

---

15 The Treasury expressed the peacetime purpose thus: "At its inception, Foreign Funds Control had as its primary purpose the protection of the assets within the United States of invaded countries in order to prevent their falling into the hands of the invaders and in order to protect American institutions from possible adverse claims." U. S. Treasury Dept., *Administration Of The Wartime Financial And Property Controls of the United States Government*, p. 3.

The added purpose to "preserve the property not only for its owners but for the benefit of Americans who may have claims" was asserted in Congress by Sen. Barkley and concurred in by Sen. Wagner. (86 Cong. Rec. 5966; our main brf., p. 46.)

16 48 STAT. 1. The changes in the 1933 version of §5(b) of the Trading With the Enemy Act are shown graphically in H. Rep. No. 2009, 76th Cong., 3d Sess.

17 H. Rep. No. 2009, 76th Cong., 3d Sess; See analysis in U. S. Treasury, *Administration Of The Wartime Financial And Property Controls of The United States Government*, p. 40.

regulate transactions in these assets abroad. However, they could be regulated, effectively, by controlling the local incidents of such transactions—incidents indispensable to the fruition of the foreign dealings. Thus, withdrawal of funds on deposit in an American bank required payment by the bank located here. Transfer of the securities of an American company necessitated the transfer of the securities on the books of the Company's transfer agent or registrar—usually a banking institution—and the issuance of a new instrument. Accordingly, financial and securities transactions, originating abroad, were susceptible of regulation by a screening process applied to these incidents, necessary to consummation of the transactions.[18]

Since, in practice, foreign commercial transactions were conducted almost wholly through banking channels, the statute—shaped to control the activities of banks in the domestic banking crisis of 1933—was adequate, by controlling the transactions of banking institutions, to protect the mobile assets of the invaded countries. "As the direct application of the freezing control is effected principally through the banking system," the Treasury imposed "upon them [the banks] the primary responsibility for the enforcement of the provisions of the freezing Order and for the adherence to the terms of the licenses issued thereunder." U. S. Treasury Dept., *Administration of the Wartime Financial and Property Controls of the United States Government*, pp. 5-6.

Such a scheme was fully adequate to protect the funds and securities against the Axis invader even as against the possibility urged by respondent—but not mentioned by

---

18 That this was the impact of freezing controls on transactions in securities is evident from the Treasury's explanation of the objective underlying General Ruling No. 3 (5 F. R. 2133). See U. S. Treasury Dept., *Administration Of The Wartime Financial And Property Controls Of the United States Government*, p. 21.

Congress—that protection was needed against "speculators." It was effective, without abrogating the constitutional power of the states to deal with local property, to meet the danger, purely hypothetical, that "speculators" would indulge in reckless speculation by purchasing blocked assets at a discount from the Axis. In any such case, a license could be withheld—thus suspending consummation of the purchase—until the true owner was able, in our courts, to test the speculator's title. No citation of authority is needed to establish that no American court would recognize the speculator's title based upon a theft committed at the point of Axis guns. With such protection afforded the true owner, we cannot, and should not, impute to Congress, in aiding the invaded countries, the purpose to strike down—at the expense of American citizens having legitimate claims—all power of the states to deal with frozen funds.

Viewed against the genuine objectives of the *peacetime* freezing controls, the Joint Resolution did not intend or promulgate an inflexible system of controls which would emasculate, in all respects, the usual power of the states to deal with property within their borders in the interests of their own citizens.[19] Congress granted no such permission to the Executive. The President made no attempt to exercise such authority. By Exec. Order 8389, he delegated to the Treasury, almost in the very terms of the Joint Resolution, those powers—and those only—which had been allowed to him by Congress.

---

19. The respondent, in defending the claim that the Joint Resolution abrogated all State power over frozen property, likens this statute to the federal *wartime* controls of rents, manpower, credit, etc. premised on the constitutional power to wage war. The comparison is inapt. The Joint Resolution was a *peacetime* measure purely. It did not purport to, and could not, rest on the war powers. Further, in their impact on the rights of persons, even the wartime controls must satisfy the dictates of due process and other constitutional limitations. *Supra*, note 10.

From the foregoing, it will be seen that the peacetime freezing controls were simply a process for screening financial and securities transactions at the point of consummation, leaving untouched transactions not inimical to the purpose of the controls. This is exemplified by the Treasury's peacetime ruling that the judicial seizure of frozen funds for *in rem* jurisdiction—to enable litigation of American claims against blocked nationals—was permissible and wholly consistent with the peacetime freezing control program.[20]

When war came, broad powers were granted to the Secretary of the Treasury (by the First War Powers Act) to deal with the property of foreign nationals.[21] Despite his

---

20 The ruling is discussed fully in our main brief, pp. 50-53 and note 9. The respondent has stipulated as a fact, in *Clark* v. *Chase National Bank* and *Clark* v. *Federal Reserve Bank*, unreported, S. D. N. Y. 1948, Civ. Nos. 44-617 and 44-618, that "From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

> *"Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States.* However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national." (Italics ours.)

Exec. Order 8389 Sec. 1, authorized the Secretary of the Treasury to apply the order "by means of [such] * * * rulings, instructions * * * or otherwise."

This settled ruling of the Treasury Department constituted the common law of the Department, so to speak, and fixed the scope of the freezing controls as applied to judicial seizure of frozen funds. *U. S.* v. *Birdsall*, 233 U. S. 223; *U. S.* v. *Mac Daniel*, 7 Peters 1.

21 The President's powers under the First War Powers Act were delegated to the Secretary of the Treasury by Exec. Order 9193 (amending Exec. Order 9095 (7 F. R. 1971; 7 F. R. 5205; 10 F. R. 6917)).

broadened authority, the Secretary chose to apply the controls in war as he had in peace. Thus, by General Ruling No. 12, issued April 21, 1942 (7 F. R. 2991) he excluded "chattels," "real property" [Gen. Ruling No. 12, subd. 5(b)] and a host of other transfers[22] from the operation of the controls. In respect to litigation, he continued the policy, which he had announced in peacetime, of permitting judicial seizure of frozen funds—limiting application of the policy considerations underlying the controls to the point at which the judicial determination was to receive the sanction of payment.[23]

In this way, the Secretary left the controls in time of war precisely what they were in time of peace—control at the point of consummation—of financial and securities transactions only.

If respondent is correct in asserting that the freezing control program was meant to be all-embracing and to apply to all forms of property, it is inconceivable that the Secretary would, especially in the emergency of war, have exempted tangible property from the controls. "Chattels" and "real property"—as well as intangibles—were susceptible, though with less facility, to (a) Axis conquest (b) use to finance the Axis war effort and (c) administration as a part of the vesting program.[24]

---

22 Some of those excluded were transfers by estate succession or testamentary disposition or to a judicially appointed estate fiduciary or such as resulted from change of marital status or were made pursuant to certain decrees of occupied Netherlands and Norway [General Ruling 12(5)(a) and (e)].

23 *Supra*, note 20.

24 These are the objectives ascribed to the freezing controls by respondent (Resp. brf., p. 34-7).

The plain conclusion to be drawn from the Treasury's handling of the freezing controls, both during peace and in war, is that the system was a flexible one, intended to be molded to achieve the Congressional objective of screening—at the point of consummation—transactions in the mobile property of blocked nationals[25] without prejudice to the rights of the states to enforce the legitimate claims of their citizens against such property.[26] The federal govern-

---

25 Construction of The First War Powers Act with the Joint Resolution confirms the view that the latter was intended merely to set up a plan for limited regulation of transactions—not a property control.

The First War Powers Act, by Sec. 5(b)(1)(A), retains in substance the regulatory plan of the Joint Resolution. But in Sec. 5(b)(1)(B) a distinctly new power is granted. Under the latter, the President may "nullify" and "void" any "acquisition" or the exercise of "any right, power, or privilege with respect to, or transactions involving, any property" of a blocked national. And the power to "nullify" and "void" is complemented by power to the President to vest such property.

Sec. 5(b)(1)(B) in granting power to "nullify" and "void" "any acquisition" of "any property" indicates that something less than this was intended in (b)(1)(A). Otherwise, if (b)(1)(A) is construed to include the power to "nullify", the two sections are an aimless duplication—a result to be avoided. *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.

The First War Powers Act changes the wording of the Joint Resolution in a significant manner. Power to "nullify" and "void", theretofore absent, is added in broad terms. The change is persuasive evidence of a changed Congressional purpose—to grant the power to nullify where none existed before. *Brewster* v. *Gage*, 280 U. S. 327, 337; *Crawford* v. *Burke*, 195 U. S. 176, 189.

The change is the more apparent here because the substance of the Joint Resolution is retained [in (b)(1)(A)] in juxtaposition to the new power granted.

By the First War Powers Act, Congress has made it clear that it was capable of language competent to grant the power to nullify when it so intended. By the same token, the omission of such language from the Joint Resolution of May 7, 1940 (with which, alone, we are concerned here) is a clear indication that no power to nullify was then intended.

26 *Supra*, note 20.

ment had no concern with who should hold the funds or credits or who should own them ultimately, so long as the ultimate owner did not acquire them for the Axis.

We have adverted to the wartime administration of the freezing controls—though they are not germane, to determine the peacetime rights here involved[27]—only because it shows the consistent purpose of the Treasury to limit the controls to their initial purpose of screening, at the point of consummation, financial and security transactions only.

With freezing controls, limited expressly and by purpose to transactions inimical to the Joint Resolution,[28] it is not surprising that the Treasury should have ruled, as it consistently did, that the judicial seizure of frozen funds for jurisdictional purposes was in harmony with, and permitted by, the program.

2. *The freezing controls in relation to litigation involving frozen funds.* Obviously, litigation in respect to frozen funds could not possibly conflict with the genuine objectives of the freezing controls, if the screening process could be applied at the point of consummation of the rights adjudicated.[29] This point would be reached when the judgment was about to receive the sanction of payment.

---

27 *Post*, note 32.

28 The Treasury acknowledged that there were many transactions in frozen assets "which are not in any way inimical to the purposes of the Control". U. S. Treas. Dept., *Administration Of The Wartime Financial and Property Controls Of The United States Government*, p. 6.

29 The argument that it was necessary to proscribe transfers by the judicial process to avoid collusive transfers as the result of default judgments, deliberately acquiesced in (resp. brf., p. 19), is a *non sequitur*. The judgment—whether contested or on default—could not be satisfied until the payment had been screened.

The Secretary of the Treasury understood this fully when he ruled, uniformly, that an unlicensed judicial seizure of frozen funds for *in rem* jurisdiction in actions brought to enforce claims of American citizens against blocked nationals was impermissible and wholly consistent with the peacetime freezing control program.[30] In line with this ruling, litigation—including cases of *in limine* seizure of frozen funds—proceeded unhampered until the point at which the judgment was to be paid. Then, and only then, the freezing controls intervened to screen the payment.[31]

The courts below have held otherwise here, despite the fact that the *in rem* seizure of the ASCAP debt in the §977-b. proceeding was wholly a *peacetime* transaction. They rested their decisions on the notion, *first*, that the freezing controls embraced all transactions and all property and, *second*, that General Ruling No. 12 prohibited judicial seizures and was competent, retroactively,[32] to avoid Petitioner's right to the ASCAP debt. We have already noted the constitutional limitations which would

30 *Supra*, note 20.

31 The New York courts experienced no difficulty in carrying out the purpose of freezing controls in conformity with the Treasury's rulings. For example, in *Bollack* v. *Societe Generale etc.* (1st Dept. 1942), 264 App. Div. 601, the Court said:

> "* * * As we regard the order [8389], compliance therewith is a condition of the execution of any judgment that may be entered in favor of plaintiff here. The defendant is entitled in any such judgment rendered against it to a provision that such judgment is not payable except on full compliance with whatever legal regulations are in force at such time. * * *"

32 Administrative orders and rulings, as well as statutes, may not be construed to operate retrospectively. *Miller* v. *U. S.*, 294 U. S. 435, 439. Where, as here, the administrative order has the sanction of the criminal laws [See Exec. Order 8389, Sec. 8], such retrospective application is forbidden by Constitutional limitations. *Addy* v. *U. S.*, 264 U. S. 239, 244-5; *Chew Heong* v. *U. S.*, 112 U. S. 536.

deny the thrust of General Ruling No. 12, if so directed, against rights acquired in peacetime. But, passing this, General Ruling No. 12 could in no legitimate sense, be given the meaning ascribed to it by the courts below.

Subd. 4 of Gen. Ruling No. 12, in the opening clause, provides that "any [unlicensed] transfer affected by the Order [8389] * * * involved in * * * any action * * * in any Court within the United States" is "valid and enforceable for the purpose of determining for the parties to the action * * * the rights and liabilities therein litigated." This opening clause is followed by the proviso that no judicial process may create a greater interest in a blocked account "than the owner of such property could create or confer by voluntary act prior to issuance of an appropriate license."

Had the proviso stated in substance that "payment could not be made out of a blocked account to satisfy the judgment in the absence of license," General Ruling No. 12 would merely have enacted, in more legalistic verbiage, the Treasury's position and rulings that the peacetime freezing controls permitted unlicensed transfers of frozen funds for the purposes of litigation. That the change was merely in language—not in substance—appears from the statement in Treasury's Press Release No. 34 where, in speaking of Gen. Ruling 12, subd. 4, it is said that "the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the *results* of court proceedings are subject to the same policy considerations from the point of view of freezing control as those arising through the voluntary action of the parties." (Italics ours.) This is to say, in effect, that it is the *result* of the litigation, *i.e.* the *judgment*, which is subject to the screening process. This view of Gen. Ruling No. 12, subd.

4, is wholly in harmony with the penetrative application of freezing controls to litigation based on judicial seizure.

However, the language actually used in the proviso of subd. 4, has given rise to respondent's argument, accepted below, that despite the broad grant in the opening clause of subd. 4, the proviso renders frozen funds incapable of judicial seizure.

The difficulty with respondent's construction of Subd. 4 is that, in practice, it would bring about utterly conflicting consequences, dependent upon whether the litigation was *in personam* or *in rem*—a result wholly unintended by anything which appears anywhere in the Ruling.

It is clear that the Ruling intends to permit actions competent validly to determine "the rights or liabilities therein litigated." Respondent's construction of the Ruling would not interfere with this purpose in the case of *in personam* actions. In such case, the personal service of the summons would provide the constitutional basis for a binding judgment fixing the rights of the parties. In such case, the validity of the judgment would in no way depend upon whether a post-judgment, unlicensed, judicial seizure, by execution, garnishment etc., was effective to create an interest in frozen funds.

Where the action was *in rem* and proceeded on constructive service, precisely the opposite would be true. In such case, the constitutional prerequisite to a binding judgment fixing the rights of the parties, is the judicial seizure, *in limine*, of the property to be dealt with by the judgment. This is because, where the action is *in rem*, the rights of the parties are determined only in respect to the property seized prior to the judgment. If, as respondent contends, the proviso of subd. 4 precludes a judicial seizure without license, no valid *in rem* judgment would be possible, despite the absence in the Gen. Ruling of any purpose to differentiate between actions *in rem* and actions *in personam*.

To construe the General Ruling as authorizing the judicial seizure of frozen funds is to make it valid and meaningful. To construe it as respondent contends is to make it illogical, contradictory and useless. Given this choice, the interpretation which is meaningful should be adopted. *U. S.* v. *Chemical Foundation*, 272 U. S. 1, 13; *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16; *Texas & P. R. Co.* v. *U. S.*, 289 U. S. 627, 640.

From the foregoing, it is evident that the Treasury's administration of the freezing controls did not, either in peacetime or during war, abrogate the power of the state to seize frozen funds for the purpose of achieving *in rem* jurisdiction.

3. *The express language of the Joint Resolution and Executive Order 8389 confirms the scope of the freezing controls as above outlined.* Respondent—having argued that the peacetime freezing controls were unyielding in their purpose to proscribe *all* transactions in frozen funds unless licensed—is forced to stretch the language of the Joint Resolution and the Exec. Order 8389 to meet the breadth of his argument. The result is an unrealistic and even fanciful construction of these documents.

He admits that transactions in frozen funds are not prevented by Subd. 1B of the Order which relates only to "*payments* by or to any banking institution." (Italics supplied) However, he says, that Petitioner's acquisition of the ASCAI debt, as permanent receiver, would be proscribed either under Subd. 1A of the Order as a "transfer of credit between * * * banking institutions" or under Subd. 1E of the Order as a "transfer * * * of, or dealing in * * * evidences of indebtedness or evidences of ownership of property * * *" (Resp. Brf. pp. 16, 17).

It should be noted that, in view of the Treasury's rulings, *supra*, note 20, that unlicensed judicial seizure of frozen funds was "not forbidden" by the freezing controls, it is really immaterial whether we regard the seizure of the ASCAI debt as a "transfer of credit between * * * banking institutions" or the transfer of an "evidence of indebtedness". The seizure, however, labelled, had the express sanction of the Secretary of the Treasury.

To apply subd. 1A of the Order here, we should have to say that the State of New York, acting through its receiver, and ASCAP, a society of musical composers, are "banking institutions". This would be to stretch the definition of "banking institutions" to the point of utter fantasy. Reasonably read, subd. 5E of the Order lends no support to such a fanciful construction of the term. Neither, ASCAP nor Petitioner, as receiver, could qualify for the part assigned to banking institutions by the freezing controls. *Supra*, p. 19.

Moreover, given his construction of Subd. 1A respondent's argument would still be fatally defective, since the statutory vesting of title in the §977-b receiver is, in no sense, a "transfer of credit" within the meaning of the subdivision. The reference to transfers of "credits between, * * * banking institutions" was first introduced into Sec. 5(b) of the Trading With the Enemy Act by the amendment made in 1933[35] to enable the President to halt the then current runs on banks. The reference was necessary to meet the banking emergency, for transfers of credits between banks, equally with actual payment, affected the stability of our banking institutions then in danger. Nothing in the §977-b proceeding resembles, even remotely, the "transfer of credit" envisioned by the statute.

Respondent's alternative contention is that the state court's seizure of the ASCAP debt is a transfer of an evidence of indebtedness or of ownership of property within the meaning of Sec. 5E of the Exec. Order. Citing criminal cases decided in Pennsylvania and Oklahoma, he argues that evidence of indebtedness refers to any legal evidence sufficient to establish the debt. From this he concludes—by a process of unfathomable reasoning (Resp. brf. pp. 17-18)—that the making of the judgment appoint-

35 48 Stat. 1, Public Law, No. 1, 73d Cong.

ing Petitioner permanent receiver somehow involves the transfer of an evidence of indebtedness.

We are spared the task of divining this argument. As used by Congress in the Joint Resolution, the meaning of the phrase, "evidences of indebtedness," is not in doubt. The phrase was inserted into the statute solely to bring stocks and bonds within the regulatory scheme. Prior to the enactment of the Joint Resolution, the Treasury had ruled that stocks and bonds were covered by the statute (Gen. Ruling No. 2; 5 F. R. 1474). Certain New York banks challenged the ruling. The phrases "evidences of indebtedness" and "evidences of ownership of property" were inserted to resolve the doubt[36] and to make explicit that which the Treasury had inferred—namely, that transfers of stocks and bonds were within the plan of the statute. This is inescapable from the following statement by the Treasury itself, at whose urging the Joint Resolution was adopted:

"Y. SECURITIES

"When the first Executive Order establishing the freezing control was issued on April 10, 1940, it was realized that if the Control was to be effective in preventing the assets of the invaded countries from falling into the hands of the invaders and being liquidated by them, a method must be found to prevent the looting and disposition of securities. Although the Order as issued contained no specific reference to securities, it was the purpose of this Government in issuing the Order to include the control of securities within its scope. Some question arose, however,

36 H. Rep. No. 2009, 76th Cong. 3d Sess. 1940; S. Rep. 1946, 76th Cong. 3d Sess. 1940; Senator Wagner in 86 Cong. Rec. 3006; *U. S.* v. *Leiner*, 143 F. 2d 298.

at the outset, as to whether the Trading With the Enemy Act of the First World War, upon which the Order was based, gave authority for the extension of the Control to securities. The Treasury Department immediately clarified its position on this question by issuing General Ruling No. 2 and stating that the Control did extend to securities. *In order, however, to erase any doubt which might have existed, Congress immediately enacted supplementary legislation pursuant to which the Order was amended so as clearly to include securities within the scope of the Control.* This action of the Treasury Department and of Congress is a striking example of how a situation needing prompt handling was met promptly. Had delay occurred, it would have undoubtedly allowed tremendous quantities of securities to escape our control."[37] (*Italics supplied*)

The plain fact of the matter is that, if any part of the Order applied to the judicial seizure of frozen funds, it was subd. 1B solely. The Treasury's peacetime application of the freezing controls makes this unmistakable. It is impossible to rationalize, on any other basis, the Treasury's consistent rulings—acknowledged by respondent—that every act directed to the seizure of frozen funds in *in rem* actions could proceed unlicensed and that only the final act of payment of the judgment required the sanction of a license.

The basic fault in respondent's argument is that it overlooks the fact that the freezing controls regulated only *transactions* in frozen funds as distinguished from the funds themselves. Not all such transactions were inimical to the purpose underlying the freezing controls. As noted, the

37 U. S. Treasury Dept., *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 20-1.

Treasury ruled, early in its peacetime administration of the program, that judicial seizure of frozen funds for jurisdictional purposes not only was not in conflict with that purpose but, indeed, was in aid of it.

If despite this ruling, the Treasury actually intended otherwise, it perpetrated a gross fraud when it encouraged litigants to attach frozen funds[38] and urged upon the highest court of the state of New York[39] its conclusion that the courts had power—consistently with freezing controls—to seize frozen funds for jurisdictional purposes. No such indictment of the Treasury need be made. It is the respondent—not the Treasury—who seeks here to reverse the position of the United States.

While, after passage, in wartime, of the First War Powers Act, the Executive had ample power to "nullify" and "void"—prospectively only—as well as to "freeze" blocked funds he chose not to do so. Instead he continued the freezing controls as a flexible regulatory plan directed only to transactions hostile to the object of the Controls. He continued, as in peacetime, to regard judicial seizure of frozen funds for jurisdictional purposes as a permissible transaction—in no wise inimical to the freezing program (Gen. Ruling No. 12, Subd. 4).

4. *As to the judicial precedents.* The respondent stands largely on the judicial precedents of the New York federal courts. *Bernstein* v. *N. V. Nederlandsche-Amerikaansche, etc.*, C. A. 2, Feb. 21, 1949, was decided by the Federal Court of Appeals subsequently to the instant case and expressly rests upon the authority of this case. *Clark* v.

38 *Supra*, note 20.

39 See our main brief, page 51, note 9.

Chase National Bank, Clark v. Federal Reserve Bank, and *Heyden Chemical Co. v. Clark*; S. D. N. Y., 1948, were all decided subsequently to the instant case and, also, rest expressly upon its authority.

The New York Court of Appeals has thrice passed upon the same issue as is here involved. In *Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332, at the urging of the Treasury as *amicus curiae*, The New York Court of Appeals expressly followed the Treasury's construction of the freezing controls to authorize the judicial seizure of frozen funds for jurisdictional purposes. Any question as to the force of this holding, so far as the New York Court of Appeals is concerned, was wholly removed by its decision in *Singer v. Yokohama Specie Bank*, 293 N. Y. 542. The latter case construed General Ruling No. 12 and must be considered to have held, precisely in accordance with the view of the Treasury, that in war as in peace the freezing controls did not proscribe litigation with regard to frozen funds. See also *Leeds v. Guaranty Trust Co.*, 272 App. Div. 909, aff'd. 297 N. Y. 1019.

We believe that the divergence in holdings between the New York State Court of Appeals and the New York Federal Courts stems entirely from the latter's misunderstanding of the freezing controls which we have fully discussed here. The Treasury, as its rulings show, never regarded the freezing controls as interfering with litigation, except at the point of consummation by payment of the judgment. Respondent has succeeded in reversing this Treasury ruling by his contrary interpretation of freezing controls—a construction for which he has gained acceptance below.

Respondent, as head of the Office of Alien Property, is interested primarily in vesting foreign property in him.

self. To this end, he has given to the freezing controls a construction never before countenanced. By so doing, he seeks to immobilize frozen property until it suits his convenience to vest. Given this construction, freezing controls are a mere tool for broadening the scope of the vesting power. He has been aided in this objective by the fact that now he—to the exclusion of the Treasury—administers the freezing controls as well as the vesting powers of the President (Exec. Order 9989; 13 F. R. 489).

We respectfully submit that the authorities which are significant here are those in the New York Court of Appeals which construed the freezing control before it was conceived of by respondent as a convenient device for improperly extending the scope of the vesting power.

CONCLUSION

The judgments of the Court of Appeals and of the District Court should be reversed.

Respectfully submitted,

A. WALTER SOCOLOW,
Counsel for Petitioner.

JOSEPH M. COHEN,
On the Brief.